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No. 92-1755

Supreme Court, U.S.
FILED
JUN 01 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

DONALD R. LAMBORNE, *et al.*,

Petitioners,

vs.

BRADLEY K. HAYNES, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

BRIEF IN OPPOSITION FOR RESPONDENTS ESTATE OF NICHOLAS C. MILLER, JOHN THORPE RICHARDS, EXECUTOR; FIRST VIRGINIA BANK-SHENANDOAH VALLEY AND CHARLES R. CASH, PRESIDENT; AND BRADLEY K. HAYNES AND B.K HAYNES CORPORATION

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WILLIAM E. SHMIDHEISER, III
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BEST AVAILABLE COPY

24 pp

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For purpose of this Opposition To Writ Of Certiorari, all of the Respondents have authorized the undersigned counsel to file this Brief on their behalf.

OPINIONS BELOW

Petitioner Donald R. Lamborne has failed to properly set forth the proceedings below. The Circuit Court of Frederick County, Virginia handed down partial summary judgment against Petitioners/Plaintiffs on October 10, 1990. That Order dismissed Counts I, II, III, and VI against all Respondents/Defendants on the grounds that the initial lawsuit was filed after the expiration of the one year statute of limitations on October 12, 1986. The court further opined that even if the one year statute of limitations had not run out, "it is the further opinion of the Court that Defendant Exhibit 3 (I) collaterally estops Plaintiffs from re-litigating the question of fraud as it is alleged against the Defendants Bradley K. Haynes and B. K. Haynes Corporation who are therefore dismissed as parties Defendant to these proceedings." The court invited counsel to further brief and argue their motions to dismiss Counts V, VII and VIII. The Order of October 10, 1990 was appealed by Petitioners to the Virginia Supreme Court, which remanded the matter without deciding as premature until all other aspects of the case were decided. After further briefing and argument, then, the Circuit Court issued its Opinion letter dated March 6, 1992, ruling that all other claims were also barred by the statute of limitations, and an Order Of Dismissal proceeded from that Opinion letter on April 21, 1992. It is this latter Opinion and Order which were the subject of the appeal and the Supreme Court of Virginia's decisions of November 4, 1992 and January 8, 1993.

STATEMENT OF JURISDICTION

Respondent Estate of Nicholas C. Miller respectfully suggests that the invocation of jurisdiction pursuant to Title 28 U.S.C. § 1257 is not appropriate, for no substantial federal questions are involved.

STATEMENT OF THE CASE

Petitioners proceed from a misunderstanding as to the reason why their case was dismissed by the Circuit Court of Frederick County, Virginia. Petitioners have the mistaken impression that their case was dismissed by the Circuit Court of Frederick County on the grounds that it was barred by *res judicata* and collateral estoppel. That is probably because the Respondent/Defendants argued vociferously before the Circuit Court that all the claims against them had been previously litigated, as indeed they had — but as can be seen from the March 6, 1992 Opinion Letter, the Circuit Court took the much easier path to dismissal, finding that all claims were barred by the applicable state statutes of limitation.

Petitioner Lambornes and their real estate development corporation, Marjec, Inc., both filed Chapter XI bankruptcy in September of 1978 to halt a foreclosure sale of the Marjec, Inc. real estate scheduled for the following day. From the beginning of the bankruptcy case the Estate of Nicholas C. Miller sought relief from the bankruptcy stay to foreclose on its collateral, consisting of 5,000 acres of mountain land west of Winchester, Virginia, and its attempts to do so were continually resisted by Lambornes. Throughout the case Lambornes represented to the Bankruptcy Court that salvation was "just around the corner," that they had a "ready, willing and able" lender, or buyer, which always required further delays to consummate. For seven years Lambornes continued to thwart the efforts of the Miller Estate to realize on its collateral by proffering one after another phantom source of funds. However, no actual money ever appeared.

On June 5, 1986 the Bankruptcy Court finally entered an Order For Relief From Stay allowing the foreclosure sale to proceed. Petitioner's primary complaint has been that the sale was inadequately advertised and sold for too little. The record in the Bankruptcy Court shows that the property was advertised through

direct mailing of over 4,000 multi-colored brochures to real estate developers in Pennsylvania, New Jersey, Maryland, Delaware, the District of Columbia, Virginia, West Virginia, Georgia, South Carolina, North Carolina, and Florida; and to all creditors and parties in interest of the Marjec, Inc. bankruptcy case; and to the auctioneer's own mailing list of persons generally interested in real estate in the Shenandoah Valley of Virginia. In addition, the property was advertised in the Winchester Evening Star in Frederick County, Virginia; in the Hampshire Review in Hampshire County, West Virginia; in the Herald Mail in Hagerstown, Maryland; in the Spirit of Jefferson in Charles Town, West Virginia; in the Baltimore Sun; in the Washington Post; and in the Wall Street Journal. Over 120 persons attended the sale, including radio and newspaper reporters and various attorneys for parties involved in the case. The weather was fine. B. K. Haynes Corporation was the high hidder on the real estate for $600,000, and First Virginia Bank - Shenandoah Valley ultimately financed the purchase.

The Order For Relief From Stay had provided that objections to the confirmation of the sale were to be filed no later than July 23, 1986. Petitioners filed no objections to the sale, and in fact Petitioners conceded in open court that the sale was conducted on July 10, 1986 in accordance with the Order For Relief From Stay entered on June 5, 1986. Atter the confirmation hearing before the Bankruptcy Court on July 30, 1986, *counsel for the Petitioners endorsed the Order Of Confirmation without objection.*

On August 14, 1986, the Petitioners filed a "Motion For Reconsideration," requesting the Bankruptcy Court to "reconsider" the decision confirming the sale. The Bankruptcy Court denied the Motion For Reconsideration.

Ultimately Petitioners appealed the Bankruptcy Court's decision to confirm the sale to the District Court for the Western

District of Virginia, and from there to the Fourth Circuit Court of Appeals. Both appellate courts affirmed the Bankruptcy Court's decision upholding the sale.

Accordingly, when the Petitioners filed their new lawsuit in the state court system, the parties Defendant argued vociferously that Petitioners' claims had already been litigated — and lost — in the federal system, and that the claims were barred by the statute of limitations. As can be seen from the decisions of the state court system, however, the state court proceeding was dismissed on the grounds that the Petitioners/Plaintiffs had filed their actions after they were time-barred by the appropriate statutes of limitation, while opining in *dictum* that even if they hadn't been barred by statute of limitations, they would have also been barred on grounds of collateral estoppel and *res judicata*, at least as to some of the Defendants.

Petitioners have not suggested that the state court was in error in holding that the state court action was barred by the state statute of limitations, nor that the state statute of limitations is repugnant to the Constitution, treaties or laws of the United States. Thus no federal question is presented.

CONCLUSION

For the reasons stated above, it is respecttully submitted that the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

PHILLIP C. STONE
WILLIAM E. SHMIDHEISER, III
WHARTON, ALDHIZER & WEAVER
Attorneys for Estate of Nicholas C. Miller, John Thorpe Richards, Executor; First Virginia Bank - Shenandoah Valley and Charles R. Cash, President; Bradley K. Haynes and B. K. Haynes Corporation
100 South Mason Street
P.O. Box 809
Harrisonburg, Virginia 22801
(703) 434-0316

Dated: May 28, 1993

APPENDIX A — ORDER OF THE SUPREME COURT OF VIRGINIA DENYING PETITION FOR REHEARING DATED JANUARY 8, 1993

Record No. 921009
Circuit Court Nos. L89-118 and L89-119

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 8th day of January, 1993.

Donald R. Lamborne, et al.,

Appellants,

-against-

Bradley K. Haynes, et al.,

Appellees.

Upon a Petition for Rehearing

On consideration of the petition of appellant Donald R. Lamborne to set aside the judgment rendered herein on the 4th day of November, 1992, and grant a rehearing thereof, the prayer of the said petition is denied.

Justice Whiting did not participate in the consideration of this case.

A Copy,

Teste:

s/ David B. Beach
Clerk

APPENDIX B — ORDER OF THE SUPREME COURT OF VIRGINIA DENYING PETITION APPEAL DATED NOVEMBER 4, 1992

Corrected Copy

Record No. 921009
Circuit Court Nos. L89-118 and L89-119

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond onWednesday the 4th day of November, 1992.

Donald R. Lamborne, et al.,

Appellants,

-against-

Bradley K. Haynes, et al.,

Appellees.

From the Circuit Court of Frederick County

Opon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

s/
David B. Beach, Clerk

By:
Deputy Clerk

APPENDIX C — ORDER OF DISMISSAL OF THE CIRCUIT COURT OF FREDERICK COUNTY, DATED APRIL 1, 1992

BOOK 80 PAGE 1052

VIRGINIA: IN THE CIRCUIT COURT OF FREDERICK COUNTY

At Law No. 89-118

DONALD R. LAMBORNE, et al.,

Plaintiff,

v.

FIRST VIRGINIA BANK - SHENANDOAH VALLEY, et al,

Defendants.

ORDER OF DISMISSAL

Upon due consideration of the issues between and among the parties and the briefs hereinbefore filed, it is the opinion of this Court as set out in its letter of March 6, 1992, a copy of which is attached hereto, that Counts V, VII, and VIII, which are the remaining Counts in this lawsuit, are all barred by the statute of limitations. Plaintiffs' Brief having acknowledged knowledge of the alleged conspiracy on October 11, 1985, the one-year statute of limitations ran out on October 12, 1986. Each party will bear own fees and costs.

Plaintiffs' objections on the grounds set out in their Briefs and arguments are noted.

ENTERED this 1 day of April, 1992.

s/ James L. Berry
Judge, Circuit Court of Frederick County

Appendix C

BOOK 80 PAGE 1053

SEEN:
s/ William E. Shmidheiser, III
William E. Shmidheiser, III
Counsel for the Estate of Nicholas C. Miller

s/ Kathleen T. Barlow
Kathleen T. Barlow
Counsel for Charles R. Cash and First Virginia Bank - Shenandoah Valley

SEEN AND OBJECTED TO;
s/ Ralph L. Payne
Ralph L. Payne
Counsel for Donald R. Lamborne and Jean Lamborne

STATE OF VIRGINIA
COUNTY OF FREDERICK, TO-WIT:

I, George B. Whitacre, Clerk Circuit Court of the County of Frederick, Va., do hereby certify that the foregoing is a true and correct copy of the Order of Dismissal as recorded in my office Law Order Book No. 80, Page 1052. Given under my hand the 7th day of May 1992, s/ Rebecca P. Hague Deputy.

APPENDIX D — LETTER OPINION DATED MARCH 6, 1992

March 6, 1992

Ralph Lucian Payne Esq.
117 North Fairfax Street
Alexandria, VA 22314

Kathleen T. Barlow, Esq.
6400 Arlington Blvd., Suite 420
Falls Church, VA 22942-2336

William E. Schmidheiser, III, Esq.
P.O. Box 809
Harrisonburg, VA 22801

Re: Donald R. Lamborne, et al. v. First Virginia Bank, et al.
Circuit Court of Frederick County - Law No. 89-118

Marjec, Inc. v. First Virginia Bank, et al.
Circuit Court of Frederick County - Law No. 89-119

Dear Counsel:

The matters remaining for determination in these cases are:

Count V - *Tortious Interference with Contract*
The Estate of Nicholas C. Miller

Count VII - *Common Law Conspiracy*
First Virginia Bank - Shenandoah Valley
Charles R. Cash
The Estate of Nicholas C. Miller

Appendix D

Count VIII - *§18.2-499 Conspiracy*
First Virginia Bank - Shenandoah Valley
Charles R. Cash
The Estate of Nicholas C. Miller

Having maturely considered the further argument and additional authorities cited by the parties relative to these remaining issues, it is the opinion of the Court that were it not for the fact that Count V is barred by the statute of limitations, the demurrer to Count V would have to be sustained on the authority of *Duggin v. Adams,* 234 Va. 221 (1987).

It appears to the Court, however, that both Counts V and VII are claims based on personal financial damage, not injury to property. Neither count alleges any "impact on the real property itself", but rather both allege "financial damages personal to the individual". *J.F. Toner & Son v. Staunton Prod. Credit,* 237 Va. 155 (1989). That being so, the statute of limitations applicable to Counts V and VII was one year and expired October 12, 1986 before the institution of these suits.

This Court has heretofore accepted the statute of limitations for Va. Code § 18.2-500 actions to be five years based on a case from the Eastern District of Virginia, *Federated Graphics Cos., v. Napotnik,* 424 F. Supp. 291 (E.D. Va. 1976). This result, however, was questioned by that court in *HMK Corp., v. Walsey,* 637 F. Supp. 710, 722 (E.D. Va. 1986) following the decision of the Virginia Supreme Court in *Pigott v. Moran,* 231 Va. 76 (1986). The reasoning in *Pigott,* amplified by *Toner,* now convinces this Court that the applicable statute of limitations for this cause of action is likewise one year and expired October 12, 1986.

Appendix D

I will ask Mr. Schmidheiser to prepare a Final Order in conformity with this opinion, noting plaintiff's objections on the grounds set out in their briefs and argument, for circulation for endorsement and submission to the Court for entry.

Sincerely,

s/ James L. Berry
James L. Berry

JLB/d

Original to Court File

APPENDIX E — ORDER OF THE SUPREME COURT OF VIRGINIA DATED MAY 8, 1991

Record No. 910030
Circuit Court Nos. L89-118 and L89-119

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 8th day of May, 1993.

Donald R. Lamborne, et al.,

Appellants,

-against-

First Virginia Bank-Shenandoah, et al.,

Appellees.

From the Circuit Court of Frederick County

Finding that the petition for appeal filed herein is premature, *see Wells v. Whitaker,* 207 Va. 616, 151 S.E.2d 422 (1966), the Court dismisses the petition for appeal without prejudice to the right of the appellants to reassert the same issues in an appeal from the final judgment entered in the underlying proceeding between Donald R. Lamborne, et al. and First Virginia Bank-Shenandoah, et al.

A Copy,

Teste:

David B. Beach, Clerk

s/
Deputy Clerk

APPENDIX F — ORDER OF THE CIRCUIT COURT OF FREDERICK COUNTY DATED OCTOBER 10, 1990

BOOK 77 PAGE 1399

VIRGINIA:

IN THE CIRCUIT COURT OF FREDERICK COUNTY

AT LAW NO. 89-118

DONALD R. LAMBORNE et al,

Plaintiffs

vs.

FIRST VIRGINIA BANK-SHENANDOAH VALLEY et al,

Defendants

AT LAW NO. 89-119

MARJEC, INC.,

Plaintiff

vs.

FIRST VIRGINIA BANK-SHENANDOAH VALLEY et al,

Defendants

ORDER

This matter came on to be heard August 15, 1990 upon the praecipe of Bradley K. Haynes and B. K. Haynes Corporation, upon due consideration of the issues between and among the parties and the briefs hereinbefore filed, it is the opinion of this

Appendix F

Court as set out in its letter opinion dated September 5, 1990 (a copy of which is attached hereto) that:

> Counts I, II, and III of Bill of Complaint designated a breaches of fiduciary duty as well as count VI all sound in fraud. Plaintiffs' brief having acknowledged knowledge of the alleged conspiracy on October 11, 1985, the one (1) year statue of limitations, ran out on October 12, 1986.
> Counts I, II, III and VI are therefore time barred as to all Defendants mentioned therein. It is the further opinion of the Court that Defendant exhibit 3 (I) collaterally estops Plaintiffs from re-litigating the question of fraud as it is alleged against the Defendants Bradley K. Haynes and B. K. Haynes Corporation who are therefore dismissed as parties Defendant to these actions.

Plaintiff's conceded in argument that the cause of action set out in counts I, IV and VI are time barred as to First Virginia Bank - Shenandoah Valley.

By these rulings the Court has ruled against the defendants on their Sec. 8.01-271.1 and Rule 3:3 arguments.

The Court will therefore invite counsel to further brief and argue their pleas and motions as they relate to the remaining parties and issues, which are:

Count V - Tortious Interference with Contract
The Estate of Nicholas C. Miller

Appendix F

Count VII - Common Law Conspiracy
First Virginia Bank - Shenandoah Valley
Charles R. Cash
The Estate of Nicholas C. Miller
Count VIII - §18.2-499 Conspiracy
First Virginia Bank - Shenandoah Valley
Charles R. Cash
The Estate of Nicholas C. Miller

Accordingly, it is ADJUDGED & ORDERED that:

1) The Defendants Bradley K. Haynes and B.K. Haynes Corporation, be and are hereby dismissed with prejudice, from these proceedings;

2) Counsel for the remaining Defendants shall brief the remaining counts within twenty-one days of September 5, 1990, at which time plaintiffs' counsel shall respond within fourteen days thereafter; with reply reserved to defendants seven days thereafter;

3) Counsel may thereupon place the matter on the next available Motions Day for argument, or, in the alternative, counsel may inform the Court that they do not desire to argue further orally and the Court will render its decision upon the basis of the briefs submitted..

AND this cause is continued.
Entered this 10 day of October, 1990

s/ James L. Berry
James L. Berry JUDGE

Appendix F

We ask for this:

s/ Kermit L. Racey
Kermit L. Racey
Counsel for Bradley K. Haynes and B. K. Haynes Corporation

s/ George W. Johnson
George W. Johnson III
Counsel for Bradley K. Haynes and B.K. Haynes Corporation

SEEN AND OBJECTED TO:

s/ Kathleen T. Barlow
Kathleen T. Barlow, ESQ.
Counsel for First Virginia Bank-Shenandoah Valley and Charles R. Cash

SEEN AND OBJECTED TO:

s/ William E. Shmidheiser III
William E. Shmidheiser III
Counsel for the Estate of Nicholas C. Miller

SEEN AND OBJECTED TO:

s/ Ralph L. Payne
Ralph L. Payne
Counsel for Donald R. Lamborne and Jean Lamborne and Marjec, Inc.

APPENDIX G — LETTER OPINION DATED SEPTEMBER 5, 1990

September 5, 1990

Ralph Lucian Payne Esquire
117 North Fairfax Street
Alexandria, Virginia 22314

Kermit L. Racey, Esquire
115 West Court Square
Woodstock, Virginia 22664

George W. Johnson, III, Esquire
Post Office Box 2740
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6400 Arlington Boulevard
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William E. Schmidheiser, III, Esquire
Post Office Box 809
Harrisonburg, Virginia 22801

Re: Donald R. Lamborne, et al. v. First Virginia Bank, et al . - Law No. 89- 1 1 8 and Marjec, Inc., v. First Virginia Bank et al. - Law No. 89-119

Gentlemen:

With apologies for the protracted consideration of this multi-faceted litigation, having made certain determinations I have decided to issue those determinations and invite further briefs and argument as to those matters remaining undecided with a view toward simplifying and focusing the issues.

Appendix G

It is the opinion of the Court that counts I, II and III, designated broaches of fiduciary duty, as well as count VI all sound in fraud. Plaintiffs' brief having acknowledged knowledge of the alleged conspiracy on October 11, 1985, the one year statute of limitations, ran on October 12,1986.

Counts I, II, III and VI are therefore time barred as to all defendants mentioned therein.

It is the further opinion of the Court that defendants' exhibit 3(I) collaterally estops plaintiffs from re-litigating the question of fraud as it is alleged against defendants Bradley K. Haynes and B. K. Haynes Corporation who are therefore dismissed as parties defendant to these actions.

Plaintiff conceded in argument that the causes of action set out in counts I, IV and VI are time barred as to First Virginia Bank Shenandoah Valley.

By these rulings the Court has ruled against the defendants on their § 8 .01-271.1 and Rule 3:3 arguments.

The Court will therefore invite counsel to further brief and argue their pleas and motions as they relate to the remaining parties and issues, which are:

Count V - *Tortious interference with contract*
The Estate of Nicholas C. Miller

Count VII - *Common law Conspiracy*
First Virginia Bank - Shenandoah Valley
Charles R. Cash
The Estate of Nicholas C. Miller

Appendix G

Count VIII - *§ 18. 2-499 Conspiracy*
First Virginia Bank - Shenandoah Valley
Charles R. Cash
The Estate of Nicholas C. Miller

The Court will ask counsel for the remaining defendants to file their briefs with respect to the remaining counts within twenty-one days of the date of this letter, following which plaintiffs' counsel may respond within fourteen days, and defendants may respond thereto within seven days thereafter.

Counsel may thereafter place the matter on a Motions Day for argument, if they wish, or may inform the Court that they do not desire to argue further orally and the Court will render its decision from the briefs submitted.

Sincerely,

s/ James L. Berry
James L. Berry

JLB/d

Original to Court File